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AUG 7 1996

MEMORANDUM FOR COMMANDERS, DEFENSE CONTRACT WAGEMENT
DISTRICTS
COMMANDERS, DCMC CONTRACT ADMINISTRATION
OFFICES

SUBJECT: DCMC Memorandum No. 96-35, Source Selection Questionnaires and
Past Performance Evaluations (INFORMATION)

This is an INFORMATION memorandum. It expires when its content is included in DLAD 5000.4, Contract Management, or within one year. Target Audience: All DCMC Personnel involved with completing Source Selection Questionnaires or Past Performance Evaluations (e.g., Administrative Contracting Officers, Industrial Specialists, and Quality Assurance Specialists).

A contractor recently asked whether it has the same right of comment on Contract Administration Office (CAO) responses to Source Selection Questionnaires before submission to Procuring Contracting Officers (PCOS) as it does on Past Performance Evaluations. The answer is that different comment procedures apply to Source Selection Questionnaires, and PCOS decide how to apply those procedures on a case-by-case basis. The following paragraphs explain.

Federal Acquisition Regulation (FAR) Subpart 42.15 requires Past Performance Evaluations for all contracts exceeding certain dollar value thresholds. (Pending the issuance of implementing DoD FAR Supplement coverage, the DoD threshold is \$1 million, i.e., past performance will be evaluated for contracts valued in excess of \$1 million. The implementing coverage should be issued in the next Defense Acquisition Circular, and the DoD threshold will then very likely become \$100,000 as of January 1, 1997.) DoD policy is that if a DCMC CAO administers the contract, the CAO will complete the evaluation. Both DoD policy and the FAR require a CAO to follow the contractor comment procedures in FAR 42.1503(b) for obtaining contractor comment before releasing a Past Performance Evaluation. Those procedures, though, apply *only* to the evaluations required by Subpart 42.15. Source Selection Questionnaires are not required by Subpart 42.15, and so the 42. 1503(b) procedures do not apply to them.

No argument should be made that FAR effectively prohibits the collection of past performance information except through Subpart 42.15 evaluations. First, the

evaluations and other types of past performance information. Second, the FAR actually encourages the use of those other types of information. For instance, while FAR 9.105-1(c) requires PCOS to consider “relevant” Subpart 42.15 Past Performance Evaluations when making contractor responsibility determinations, it also goes on to extensively list other sources of information which should be consulted. Most of those other sources, in one way or another, relate to past performance. Examples include bid or proposal information, or questionnaire replies, from the prospective contractors themselves; the List of Parties Excluded from Federal Procurement and Nonprocurement Programs; publications; reports from suppliers, subcontractors, and customers of the prospective contractors; and, of course, preaward surveys.

Similarly, Subpart 15.6--which through cross references in other parts of the FAR applies to all types of acquisitions where past performance is a source selection evaluation factor--states that acquisition officials have broad discretionary authority concerning the sources and types of past performance information to use in evaluating bids and offers. Subpart 42.15 evaluations are mentioned, in 15.608 (a)(2) (ii), only as a source of information that “maybe used.”

The procedures for prospective contractors commenting on non-Subpart 42.15 past performance information vary according to the purpose behind the information’s collection. FAR 9.105-3(a) flatly prohibits release outside the Government of any information accumulated for determining prospective contractor responsibility. A general exception applies to information the Freedom of Information Act requires to be released, and 9.105-3(b) and (c) make two specific exceptions for preaward surveys, but all other information used for determining responsibility is not releasable.

The procedures for bidders or offerors commenting on non-Subpart 42.15 past performance information collected for competitive award evaluation fall under FAR Subpart 15.6. As it turns out, Subpart 15.6 also provides for the award of contracts without discussions with offerors--even acquisitions solicited as competitive negotiations--provided the PCO indicated the Government’s intention to do so in the solicitation. (See 15.610 (a).) In those cases, obviously, there is the potential that PCOS might make award decisions based, at least in part, on past performance information a prospective contractor has never commented on or discussed.

On the other hand, if there will be discussions with prospective contractors, two points become important. First, FAR 15.604(c) and 15.61 O(C)(1) place PCOS in control of any discussions or negotiations concerning cost or price, technical requirements, terms and conditions, and past performance. Second, FAR

15.6 10(C)(6) requires that during the discussions, PCOS must give prospective contractors an opportunity to discuss past performance information on which they have not previously had an opportunity to comment.

All of this discussion leads to a very simple procedure for CAO personnel to follow when dealing with questions about contractor discussion or comment on non-Subpart 42.15 past performance information: Refer the questions to the cognizant PCOS. The PCOS will know for what purpose the information is being collected, and therefore which procedures--Subpart 9.1 or Subpart 15.6--to follow. Additionally, if there will be discussions with prospective contractors concerning non-42.15 past performance information, the PCOS are required to control those discussions. PCOS might ask CAO personnel to attend those discussions, or might delegate past performance discussions to CAOS, but those choices belong entirely to the PCOS. If there are any questions, please contact Mr. Mike Williams, Chief, Contractor Capability and Proposal Analysis (AQOD), (703) 767-3397 or DSN 427-3397; or Mr. Bill Lonstein, AQOD, (703) 767-3383 or DSN 427-3383.

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